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tions, we do not attach high merit to these books, while we have been anxious to avoid those sweeping and sneering denunciations, which are neither valuable nor difficult, though unfortunately they are apt to obtain more credit than they deserve, with those who measure the weight of criticism by its flippancy, or its bitterness. We have uttered our thoughts, and desire them not to pass for more than they are worth. As to the future literary projects and doings of the writers, who have now passed under our notice, we take it not upon us to exhort or advise. While they keep within the bounds of good morals and decorum, let them write on, if they feel moved to this exercise, and are willing to run the risk of laboring sometimes in vain. Those persons, who waste their time in reading poor novels, or, if our readers please, any novels, would probably waste it in some other way not more innocent, if novels were not to be had. If cards and the theatre languish in this age of novel reading, the public morals are not likely to suffer by this change of amusement, and, in short, a man may as well employ himself in writing, or reading a novel, as in cutting a diamond into an indifferent figure, or wearing it after it is done.

ART. V.—*A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, being a Valedictory Address, delivered to the Students of the Law Academy, at Philadelphia, at the Close of the Academical Year, on the 22nd of April* 1824. By PETER S. DU PONCEAU, Provost of the Academy. *To which are added a Brief Sketch of the National Judiciary Powers Exercised in the United States, prior to the Adoption of the present Federal Constitution.* By THOMAS SARGEANT, ESQ. Vice Provost. *And the Author's Discourse on Legal Education, delivered at the Opening of the Law Academy, in February* 1821. *With an Appendix and Notes.* 8vo. pp. 254. Philadelphia, Abraham Small, 1824.

IT is a remarkable circumstance, that, from the earliest antiquity of the law, at least after it began to assume the form

of a science, there have been two schools of construction, the one contending for a literal adherence to the text, and the other supporting a more liberal principle of interpretation, and allowing greater latitude to the spirit of an enlightened juridical philosophy. This division among the professors of the Roman law, of which we have an agreeable history by Heineccius, commenced under the administration of Augustus, and continued until the reign of good Aurelius; the students of law generally arranging themselves as disciples of one sect or the other, although it was some time before they assumed the permanent appellations, by which they were afterwards distinguished, of Proculeians, and Sabinians, or Cassians. The lawyers of the latter reign, according to Claude Ferrière, translated by the learned Dr Cooper, 'affected neither party in particular, for at different times they dispassionately approved the opinions of either sect, as they judged them more or less agreeable to justice and right reason, and they generally endeavored, by an equal temperature, to avoid the absurdities into which both parties, by reason of their great dislike and opposition to each other, had frequently fallen.' The division may be deemed to have died away during the dark ages, when the books of the law were lost, like those of Livy. The subject was revived, and this question made a conspicuous figure in the discussion of the Code Napoleon; and, singular as it may seem to those, who are familiar with the sturdy spirit of the old common law, something of this difference has actually crossed the channel into England; although, as Mr Butler observes, 'the good sense of English lawyers has prevented them from forming into sects.' There is, however, one instructive and nvaluable reading, on a subject of this kind, to which we are referred among the relics of the philosophical mind of Burke, in a report of his on the trial of Warren Hastings, namely, 'whether in cases for which neither the written nor unwritten law of a nation had provided, courts of law might make a provision for it, by conforming existing laws and principles to it, or by subtracting from their operation?' But this is going a length, to which we have no inclination to be enlisted. And we are moreover aware, that the topic, on which Mr Du Ponceau is engaged, is one about which the public, or at least that portion of it, which enters into the spirit of such

subjects, and concerns itself the most with the genius of the system, is somewhat at a stand; and we believe there are some of the fairest, and most intelligent minds in the country, that have not been quite able to come to a satisfactory conclusion.

We are not left in the dark to trace the origin of our jurisprudence. In seeking to find it by the light of history, we are naturally led back to the municipal institutions of our mother country. These are the *gentis incunabula nostræ.* It has always been considered the privilege of colonies to carry with them the laws of the mother country, from the time of Thucydides, to the time of Sir Walter Raleigh; and it is delightful to reflect, that our principles of colonisation, in this respect, were actually drawn from the undefiled fountains of Grecian Jurisprudence, in their present state, as they were exhibited and illustrated in those beautiful images of Greece herself, which successively arose among her offspring in the Archipelago, and were reflected on the coasts of Asia Minor and Græcia Magna. It is rather an interesting coincidence, that the publication of the great work of Grotius, in which these principles were unfolded, was nearly coeval with the colonisation of this country; and we consider it quite plain, that the English establishments on this continent were formed more after the model of the Grecian, than the Roman colonies, though it was equally a fact, that the laws of Rome extended with her empire.

The points of difference, it does not fall within our present province to define, nor to defend the analogy to which we allude. Upon the soundest principles of public jurisprudence, the colonists considered the law of England as their patrimony. They claimed the common law as their birthright. The same rule of common sense prevailed in regard to this subject, on both sides of the Atlantic; and the doctrine was recognised in Westminster Hall as it was held here, that the common law of England extended to these colonies, precisely so far as it related to their circumstances. It is perfectly evident, however, that the original constitution of England did not contemplate the extension of its internal jurisprudence to such exterior establishments, as they could not have been foreseen to form component parts of the empire. This was a case, that arose unexpectedly out of

the appropriation of this newly discovered country among the powers of Europe; and the jurists of England adjusted the question, as well as they could, according to the general analogies of their own system.

The regulations adopted for the government of these newly acquired territories were, therefore, in the first instance, the precipitate result of so much speculative sagacity as fell, for instance, to the portion of that second Solomon, king James the First; who, in his childish exultation over his precious carcanet of colonial rubies, *onyx cum prole*, entertained a design of consummating their earthly felicity, by a complete codification of his own wise making. The consequences of this simple folly might, however, have been overruled, so as to be rendered less pernicious, than the evil starred projects, and mysteriously guided counsels, of his immediate descendants. By their frames of government, the colonies were forbidden to exercise the powers of legislation, in any manner repugnant to the laws of England. That they should be obliged to avoid all acts in derogation of that sovereignty, upon which they reclined for protection during their infant period, was a perfectly suitable provision; but that it should have any bearing in matters of a merely municipal nature, having no relation to their dependence, nor connexion with the internal police of Great Britain, nor affecting the interest of the empire, any further than it concerned their own domestic economy and improvement, was at least an absurd and impracticable piece of supererogation. For the mother country to pretend to interfere in these concerns, for the sake of promoting her own exclusive interest and aggrandisement, was unquestionably oppressive and intolerable. The true principle and spirit of this political restriction undoubtedly were, to prevent the passing of any laws inconsistent with the interest, or incompatible with the integrity of the whole empire, of which they constituted part; and it was analogous to the policy of the present constitution of the United States, by which the independent states are deprived of the power of passing any acts, repugnant to its provisions or its spirit. The colonies, therefore, justly considered it in no wise repugnant to their obligations or allegiance, and as no more a violation of the laws of England, than an infraction of their own char-

ters, to adopt all such regulations of a merely municipal nature, as they might find useful or expedient for themselves, and suitable to their condition.

It may be the more material to keep these circumstances in view, inasmuch as the common law not composing a specific text, it is to be traced in considerations of a general political and civil nature, at least in regard to ourselves, with as much propriety as it is to be sought in the more authentic records, which it acknowledges, of judicial precedents, and juridical commentaries. Furthermore, it is interesting, that on this circumstance, namely, that it did not constitute a regular, definite, and elaborate code, connected with its contiguous causes, we are to account for, and explain the most singular phenomenon, the *neque idem manebat, neque idem decedebat*, of American common law. This circumstance itself has been seized, with a prodigious avidity, to prove the incoherence of any hypothesis whatever of common law for the country. It is therefore useful, in this point of view, to advert to the causes of that deflection, which the common law underwent in this country, as well as to account for the various casts, which it assumed among the different colonies. It is rather desirable, in this respect, to redeem the common law from the reproach attached to it from these causes, as being either a very inconsistent or indifferent species of jurisprudence. Our worthy forefathers have enjoyed quite as much credit, as they fairly deserved, for the amusing casuistry, with which they have been accused of construing their charters, and the legerdemain with which they were suspected of changing their tenures. In this respect they did but practise, in any way, upon the genuine spirit of the common law itself, which is not, after all, quite so crabbed, as some of its adversaries are pleased to suppose; but is a more flexible and apt species of jurisprudence, containing an internal principle of reformation within itself, and accommodating itself with equal facility to the advances of science and the changes of society.

The character of the common law, in this respect, richly justifies all the remarks, which are made by Mr Du Ponceau, in different parts of his work, and especially the well considered eulogium of the late Mr Justice Wilson, in his charge

on the trial of Henfield and Singleterry, extracted by Mr Du Ponceau in his preface. Our own opinion on this point, indeed, is sufficiently indicated in our last number but one, in the occasion we had to comment upon an interesting and important branch of maritime law. Concerning the fictions, that were invented by the colonial lawyers, to sanction or systematise these just and necessary inflections of its rules, to the uses and circumstances of the times and their own peculiar situation, according to their narrow notions and technical conceptions of the common law, they were, without doubt, sufficiently ingenious and absurd; but they only serve to show the fashion of juridical thinking at that day, and the vague fancy for something like codification, which possesses the spirit of some part of the profession, and from which our most barbarous old common lawyers were not entirely free.

As the colonies were settled at different intervals, *diversis manipulis*, and the common law was in the meantime undergoing considerable mutations from acts of parliament, and modifications from judicial decisions, in cases of more or less novelty in England, they consequently received the common law at various successive stages of improvement. Actual diversities, without any doubt, resulted from legislative provisions, as well as judicial determinations, in the different colonies themselves. But as they mainly grew out of the different circumstances in which they were situated, and the peculiar interests of their separate sections; as they were not incompatible with the general welfare of the whole; and as the colonies constituted altogether one great community, there was nothing in these minute variations, to demonstrate any actual departure from the proper principles of the common law, or to establish absolute dissonance in the character of the system, in respect to which they were, in truth, to be regarded as being in the spirit of the most perfect harmony. As the colonists were collected together under circumstances, essentially different from the condition of their fellow subjects in Great Britain, having mutual interests, accompanied by a perfect intercommunity of social rights, and sustaining the same general system of civil relations, there was a general affinity pervading all their colonial institutions, which had an original basis in the proper principles of the common law.

These circumstances, therefore, afford no more ground for any conclusion, detracting from the existence of a common law among the colonies, than there is to be drawn from the various customs in England, or the privileges of the counties palatine, against the general power and authority of the common law there. Or they may be compared, perhaps, more aptly, to the great variety of *coutumes* existing in France, which it was the favorite object of her most illustrious sovereigns, and enlightened jurists, particularly the Chancellor D'Aguesseau, to condense into one uniform system of jurisprudence. The civil law was nevertheless the basis of all these varieties; it is, indeed, as Mr Du Ponceau denominates it, the *jus commune*, or the common law of Europe, the general foundation of the continental systems of jurisprudence. There is another circumstance, which ought not, perhaps, to be entirely omitted, although it may not amount to much in the aggregate; namely, that some of the thirteen colonies were of foreign extraction, and acquired by conquest or cession. These would properly be entitled to preserve their original institutions, until their population became so intermingled with the new inhabitants, that it could no longer be distinguished, and their particular customs became gradually merged in the prevailing law of the land. In fact, there were none of the colonies, in which all traces of foreign jurisprudence were more perfectly obliterated, and the features of the common law more distinctly impressed, than in those middle states, which were formerly in this condition. Indeed, if any difficulty of this kind could have arisen, in regard to this question, it would have been after the conquest of Canada, and its incorporation into our colonial system, where, by the terms of the cession, the French law, founded on the civil, still prevails, and holds, at least, a divided empire with the English common law. Such a case actually exists in Louisiana, where the civil and common law unite, like the waters of the Missouri and the Mississippi, which flow through it.

We are fully persuaded, that this question, which engages Mr Du Ponceau, cannot be thoroughly investigated, and the true body of American common law effectually disinterred, without going back beyond the origin of the constitution, and

digging somewhat deeply into the grounds of our colonial jurisprudence. The period before the Revolution may well be denominated the Antejustinianean era, and in the principles of our colonial polity, we may discover the seeds of our present system. There we may discern the germs of our present establishments, and the stamina of all our civil institutions. There may be some complexity in the principles, and some difficulty in pursuing the details of this inquiry, but ample causes exist for supporting the conclusion, that, though divided into different forms, and distinguished by a variety of particulars, relating to their local interests and usages, in respect to the franchises enjoyed under their charters, and the privileges parcelled out by the proprietors, or those more immediately derived from the prerogative, yet they appear to have constituted, in many material respects, one common system of *colonial polity*. And we are happy to avail ourselves of the opportunity, presented by Mr Sergeant's discussion, in its nature a preliminary one, of doing something towards completing the sketch he has given of the state of the judiciary powers in this country, at a period prior to the adoption of the constitution.

Among the reasons for entertaining such a supposition, we may advert to the following circumstances, namely, that all the lands were held originally under grants from the crown, which claimed the whole country by virtue of discovery and right of occupation; that the colonists were all fellow subjects, owing a common allegiance to the king, and claiming a common protection from the crown of Great Britain; the diversities in their condition springing from their charters, and kept up by their forms of government, resulted, also, from the acts of the crown, while at the same time their local differences were adjusted, and their mutual relations harmonised, by the general superintending authority of the empire. The most embarrassing part of the inquiry relates to the power of parliament; principally because questions were raised, in the course of political disputes, of a practical character, which admitted of no umpire, and which could only be settled at the point of the sword. From jealous apprehension of the designs of the English Commons, to make arbitrary assessments upon their property, the colonists were inclined to put themselves entirely under the protection of

the king, and finding that he entered equally deep into the combination against their rights, they came to the conclusion of rejecting the power of parliament altogether. How parliament ever came by the power, that it actually exercised so long without much question or offence, is foreign from the present inquiry, any further than to remark, that it was one of those jewels of the crown, which were wrested with the diadem from the brow of Charles the First, and that the celebrated Navigation Act, which was so long considered as essential to England in peace, as the rule of 1756 was in war, was the earnest of this assumption, and long remained the surviving monument of the usurpation.

But whatever the origin of this authority may have been, an inquiry, which finally ceases, like many others, to be of any practical importance, this is certain, that such a power was not only, for a long period, exercised by parliament with impunity, as it respected the external condition of the colonies as parts of the empire, but its authority was also acknowledged to extend by common consent, in general acquiescence, in several instances, so far as to regulate their internal concerns, and control their reciprocal relations. Besides the Navigation Act, and other salutary provisions of the same description, for regulating the trade and commerce of the colonies, imposing duties on *exports*, and restraints on manufacturing industry, acts of imperial legislation, which came gradually to be regarded in rather a questionable shape, and which terminated at last in producing a prosperous rebellion,—besides these, there were again others of a more strictly municipal character, the operation of which was never practically contested, nor their principle theoretically disputed. Among these provisions may be enumerated, the acts of parliament; 1, establishing a *general post office* at the beginning of the last century, and raising a revenue on postage for defraying the expense of the establishment, of which Franklin was at the head, just before it was abolished by the Revolution; 2, regulating the *colonial currency*; 3, altering the *laws of property*, by changing real estates in some respects into chattel interests; 4, altering the *rules of evidence*, by requiring the admission of affidavits of creditors, duly authenticated in England, by the courts of justice in the colonies; 5, laying an assessment of *hospital money* on

American seamen; 6, dissolving *contracts of service* created by indentures, and discharging apprentices from their masters on their enlistment into the army; 7, *naturalizing* all foreign protestants and Jews, residing seven years in the colonies.

Mr Du Ponceau remarks, that 'until the late Revolution, the British colonies, although separated by local governments, never ceased to make one whole with the remainder of the British empire, and have never ceased to be under a national superintending government.' 'Before the Revolution,' he adds, 'it was in the king and parliament of Great Britain, whose powers were limited, like those of the government which supplies its place.' It was a maxim of English jurisprudence, that though acts of parliament did not extend beyond the empire, nor operate upon its dependencies *proprio vigore*, yet they applied to, and bound them, when they were expressly comprehended in the purview of the act. This was rather an ambiguous authority, which was never either precisely contested nor conceded, never absolutely yielded in any matter of money, nor called in question, when it was exercised for the benefit of the colonies. In consequence of the events of our Revolution, it has probably been silently abandoned in relation to the remaining colonies. However the exercise of a power of executing a general system of internal improvement, for example, by cutting roads and canals through the colonies, might have been relished, we have no great reason to suppose it would have been resisted by the stoutest champions of their rights and liberties, so long as the government should have limited itself to the application of its own resources, and abstained from extracting an involuntary appropriation from the colonial treasuries. This was a point on which they were somewhat particular; and in a matter of that kind, it was very much their manner, rendered rather inveterate by usage, and somewhat irritable by opposition, to do nothing without asking their own advice. The act requiring the use of stamps in courts of justice, afterwards so odious, differed only from the provision before alluded to, respecting affidavits, in this ungracious circumstance, that it went to raise a revenue against their will. In the act for the general post office establishment, it is a little

remarkable, that even this specific difference was overlooked; and it is a circumstance of some curiosity, that Franklin, who was the Falkland of our civil war, so long as it would tolerate any neutrality, and was no foe, on the whole, to the temperate authority of parliament, enjoyed a salary from this source, which did not exactly square with his argument, while he acted as an agent in England. It is another striking illustration, that the celebrated Albany plan of union, which was projected on the eve of the war of 1756, for colonial defence, and which was finally rendered abortive, by the compound jealousy of the English government on one hand, that it gave too much strength to the colonies, and their own suspicious apprehension on the other, that it conferred too much power upon the crown, was to be founded on the final authority of an act of parliament.

It will also be remembered, that when that fine territory, now distinguished by the general name of the Valley of the Mississippi, which was conquered in that war, was secured by the treaty of peace, it was parcelled out into provinces by a royal proclamation in 1763. The policy of this proclamation, invalidating any unauthorised acquisition of the Indian title, has been supported by a recent determination of the Supreme Court of the United States. We believe it is also a fact, that the king had his forests interspersed among the provinces, and was accustomed to mark his broad arrow on the trees most suitable for the tall admirals of his royal navy; and if we are not mistaken in our recollection, the late Governor Wentworth, of New Hampshire, was the last who enjoyed the office of royal ranger, or surveyor. It is, moreover, well known, that the royal domains remaining in the country, or the crown lands, as they were called at the commencement of the Revolution, were claimed by the United States as common national property, on the ground of conquest in their confederate capacity. To pursue the point, however, through the difficulties that were made by Maryland, during the Revolution, on account of her circumscribed boundary, to the mode in which the subject was finally settled by Congress, although it would not prove unprofitable to the question, would lead to an anachronism in the discussion of it, which may as well be passed over.

Throughout the whole of our controversy with Great Britain, the colonists contended for the existence of a general civil constitution for the colonies, to which they constantly appealed for the definition and security of these rights, which they claimed as native born subjects, and which was founded, and could be maintained, on no other basis, than that of the common law of England. Indeed it cannot be contested, that the elements of the English system of jurisprudence, existed in their full vigor in the colonies, excepting such parts of it as related more exclusively to its feudal and ecclesiastical institutions. Governor Pownall, than whom, it is probable, a more constitutional jurist did not exist in the colonies, and whose authority is frequently referred to with the utmost respect by Dr Franklin, lays it down as a rule universally adopted through all the colonies, that they carried with them to America the common law of England, with such portion of the statutes, observing the ecclesiastical exception, as were in force at the time of their establishment.* In all the colonies, he says, the *common law is received as the foundation and main body of their law.* The variegated aspect, which this common law exhibited in the colonies, may be accounted for mainly by two circumstances. The first is, that it was a system of principles, depending chiefly for its form on its judicial administration; and, secondly, that the jurisprudence itself, not being contained in any exact code, but in a combined condition with actual jurisdiction, these elements did not so much require to be embodied, as to have a general organ established for their interpretation.

These circumstances must be taken into view together, to explain the apparent discrepancies in the colonial system. It is a characteristic principle of the common law of England, that its evidence exists emphatically in judicial exposition. This circumstance naturally gave the common law the complexion of a *Jurisprudence d'Arrets*, or what is familiarly denominated judicial legislation; and would probably have produced the same mosaic and tesselated appearance, that is presented in the parliamentary law of France, but for the peculiar structure of the English system, the intercommunication of the courts at Westminster, and the

* The Administration of the Colonies; wherein their Rights and Constitutions are discussed and stated. By Thomas Pownall, &c. London, 1768

predominant capacity of the House of Lords, as an ultimate tribunal to pronounce the common, and expound the statute law of the realm. 'In England,' says Mr Du Ponceau, (p. 127,) 'there is, in fact, but one great judicature, sitting at Westminster. Although divided into different tribunals, the same spirit pervades them all; and in important cases the twelve judges meet together to decide. Above them all is the House of Lords, whose judgments are final and conclusive.' But in that country, again, he remarks, (p. 6,) 'the jurisdiction of almost every tribunal is derived from the common law, *that is, from ancient usage.* From the same source proceeds, at the same time, almost the whole of English jurisprudence. *Jurisdiction and law flow together in a mixed stream,* which in England there is little necessity to analyse, in order to separate its component parts.' The same intermingled current has passed over to us, it may be added, as it descended from antiquity.

Still the natural consequences of this primal constitution of the common law are obvious, and their operation is well illustrated, by the description given of it by Lord Chief Justice Hale, in the ancient county courts, into which England was formerly divided, according to the following enumeration. 'First, the ignorance of the judges, who were freeholders of the county; secondly, that these various courts bred varieties of law, especially in the several counties, for the decisions or judgments being made by divers courts, and several independent judges and judicatories, who had no common interest amongst themselves, in their several judicatories, thereby, in process of time, every several county would have several laws, customs, rules, and forms of proceeding; thirdly, that all the business of any moment was carried by parties and factions, and that those of great power and interest in the county, did easily overbear others in their own causes, or in such wherein they were interested, either by relation of kindred, tenure, service, dependence, or application.' This is certainly a very natural account of the operations of such consequences as would be apt to follow, in the absence of a general controlling jurisdiction, such as did not exist in the colonies, and on this subject Governor Pownall very candidly remarks, that it was no disgrace to many gentlemen, sitting on the benches of the courts of law in the colonies, to say

that they were not, and could not be expected, to be lawyers learned in the law.* Still, in England the common law arose superior to all these circumstances, and vindicated to itself a character, to which causes could not be equally propitious here.

Although the common law was thus received in all the colonies, as the foundation and main body of their law, Governor Pownall further remarks, that each colony being vested with legislative power, in addition to the circumstance before alluded to, of the exercise of judicial authority, the common law became thereby liable to continual alteration; so that, 'as a great lawyer of the colonies, probably a crown lawyer, had said, by reason of the diversity of their resolutions, in their respective superior courts, and of the several new acts or laws made in them severally, the several systems of the laws of those colonies grew more and more variant, not only from one another, but from the laws of England.' (p. 108.) Upon this point again, Governor Pownall observes, (p. 102,) that 'where the circumstances of a country and people, and their relations to the statutes and common law differ so greatly, the common law of these countries must, in its natural course, become different, and sometimes even contrary, or at least incompatible with the common law of England, so that in some cases, the determinations arising both from the statute and common law, (namely, of England,) must be rejected. This renders the judicatories of these countries vague and precarious, if not arbitrary, and leads to the rendering the common law of the country different, incompatible with, if not contrary to and independent of, the law of the mother country.' In support of these remarks, the following observations are quoted from an author of one of our colonial histories. 'The state of our laws opens a door to much controversy. The uncertainty with respect to them, renders property precarious, and greatly exposes us to the arbitrary decision of bad judges. The common law of England is generally received, together with such statutes as were enacted before we had a legislature of our own. But our courts exercise a sovereign authority, in determining what parts of the common and statute law ought to be extended;

* See Administration of the Colonies, &c. pp. 101, 103.

for it must be admitted, that the difference of circumstances necessarily requires us, in some cases, to reject the determinations of both. In many instances they have also extended even acts of parliament, passed since we have had a distinct legislation, which is adding greatly to our confusion. The practice of our courts is not less uncertain than the law. Some of the English rules are adopted, others rejected. Two things, therefore, seem to be absolutely necessary for the public security; first, the passing an act for settling the extent of the English laws; secondly, that the courts ordain a general set of rules for the regulation of practice.' Governor Pownall observes, that, 'from this representation of things, it is evident that something is wanting to fix determinately the judicial powers,' and further, he deemed it important to make an entire new organisation of them, on principles which he suggests, analogous to the general jurisdiction already established by the laws of England, and corresponding to the political constitution of the colonies. Some objection, he supposed, might be raised in the minds of the colonists against the erection of any new jurisdiction, established by powers not known to the laws of the realm; but no solid objection seemed to exist, in his view, to the establishment of courts, 'the laws of whose practice, jurisdiction, and powers, are already settled by the laws of the realm.' It was a question, which he anticipated, whether the crown could, or could not, erect in the colonies, without the concurrence of the legislature, courts of chancery, exchequer, king's bench, common pleas, admiralty, and probate, or ecclesiastical courts. However that might be, he considered it a subject strongly recommending itself to the wisdom of the imperial legislature.

The remarks of Governor Pownall on this subject, are so exceedingly instructive, that we regret that our limits, already considerably encroached upon, will not allow us to extend them. In order to comprehend the subject fully, and at the same time encounter the appalling exhibition he has presented, concerning the causes of the corruption, as the crown lawyers might be pleased to consider it, of the colonial common law, and also apprehend the grounds of his proposed reform, it may be convenient to advert to the actual judicial constitution of the colonies, as understood in theory, and established in practice.

By the theory of the colonial government, the power of administering justice was unquestionably an emanation from the sovereignty. By the constitution of the empire, the king was the fountain of justice. Witness ourself at Westminster was the style in which the current ran in England; and it is a familiar anecdote of the same Solomon, who sat upon the English throne, that he was seized with the fancy to preside, according to the flesh, as the absolute personification of justice. Judicial proceedings were all conducted in the colonies in the name of the king, with the exception of a short period, when our ancestors in Massachusetts Bay undertook to coin their money, and lay down the law in the name of their own supreme majesty,—one of those juvenile exploits of state sovereignty, for which they were afterwards fined, in the loss of their charter, with the penalty of being reduced to the form of a province; and also of having the province of Maine incorporated with the old colony in her boundaries.

This authority of the sovereign, however, was not enjoyed undivided, nor its details undisputed. The crown assumed the power of establishing courts, and retained the actual appointment of judges. This last point was never practically contested, but it was asserted as a principle, by the colonial jurists, that courts could not be erected without an act of their own legislature. It was not contended by the crown lawyers, that the claim of the crown to erect judicatories in the colonies, extended to any right of defining the jurisdiction of those courts, or the laws by which it was to be exercised. They did not assume the power of establishing any new species of authority, unknown to the laws of the realm; but the ground on which they placed the pretension was this; 'The crown names the judge, and establishes the courts, but the jurisdiction is settled by the laws of the realm.' And here the question rested until the Revolution, when it worked itself into the catalogue of grievances. With this limitation of the power of the crown, and this protest against the erection of any tribunal, on principles unknown to the laws, it was evidently the impression entertained, by some of the most liberal and enlightened jurists in the colonies, that there was no constitutional impediment to the establishment of courts, the rules of whose jurisdiction should be previously recognised, defined, and settled, by the laws of

the realm. It appears to be a fact, that all the powers, which existed in the colonies for administering justice, were derived originally from the crown, either through the instrumentality of their charters, or by commissions to the governors. These latter especially contained an express delegation of all its judicial power, and jurisdictions of chancery, admiralty, and supreme ordinary, as well as of common law, and authorised or directed the establishment of courts.*

It is stated by Mr Sergeant, in the sketch of the national judiciary powers, exercised in the present United States, from the first settlement of the colonies, that a general superintending power was exercised by the king in council, by way of appeal from the decisions of the colonial tribunals. The reason of this institution, which is very briefly mentioned by Mr Sergeant, is involved in some antiquity, and is to be explained by recurrence to the early history of England. As the feudal system was confined to the mother country, its polity could only be extended to the colonies by fiction. The county palatine of Durham, presented the first model for their formation; as in the charters of Carolina, Maryland, Maine, and the Caribbee Islands. This was succeeded by a comparison of them of a sudden, to the Dutchies of Gascoigne, or Normandy, which the king held as his own demesnes, *in partibus exteris*, not parcels of the realm, nor properly annexed to the crown of England. From that period the condition of the colonies was considered the same as that of Jersey, which was part of the Dutchy of Normandy. And at this time, there being no precedent for any judicial establishment out of the kingdom, except those of Guernsey and Jersey, relics of the Dutchy of Normandy, which were not considered as united to the realm, appeals were brought not to the court of chancery, nor to the House of Lords, but were made to the king in council, as though he were still duke, according to the ancient custom of Normandy. The same regulations were adopted for appeals. In Jersey, appeals lay in matters of property above the value of three hundred livres tournois; and appeals in the colonies were restricted to cases of three hundred pounds sterling. This

* Pownall's Administration of the Colonies, pp. 85, 105, 110, 111.

Norman custom, as Governor Pownall calls it, continued to be the corner stone in the construction of their judicial system.

Appeals were frequent to the king in council, from the highest courts in the colonies before the Revolution. Mr Sergeant refers to several in Pennsylvania, and the great case of Vaughan, appellant from a judgment in New Hampshire, in favor of Mason, as proprietor of the province, for lands in Portsmouth, which was argued by counsel before the committee for trade and plantations of the privy council, and on their report ratifying the verdict, judgment was affirmed by the king in council. This is recorded by Dr Belknap, in his history and appendix. Mr Sergeant surmises, that in some instances, the appeal was first to the governor and council, and refers to a case in Lord Raymond, brought from the island of Barbadoes, after going through this process, before the king in council. According to the late Dr Christian's account of it, this is in fact a court of justice, which must consist of at least three privy counsellors; and the usual mode of exercising its judicial authority is in committee of the whole privy council. (1 Bl. Com. 232.) Charles the First, pursuing his idea of managing the colonies, as his own separate concern, delegated this appellate jurisdiction to the council, which he established for governing the plantations. This appellate authority, exercised by the king in council, was an anomaly in the system, and was properly confined to those cases, which were considered special flowers of prerogative, such as idiocy and lunacy, and by rather an ill omened association, admiralty. By a very natural process, upon this principle, appeals from the vice admiralty established in the colonies, came to be heard before the same tribunal; and as the jurisdiction of admiralty soon acquired an affinity for matters of exchequer, cases of that kind from the colonies were also carried, by a familiar operation, before the king in council.

Sir William Blackstone states, that whenever a question arises between two provinces in America, or elsewhere, concerning the extent of their charters, &c, the king exercised original jurisdiction therein, upon the principles of feudal sovereignty. And in the case of Mostyn and Fabrigas, which was decided in England just before the Revolution.

and after the publication of the Commentaries, (1774,) Lord Mansfield lays down the doctrine, that no question concerning the seignory can be tried within the seignory; and, therefore, when a question respecting the seignory arose in the proprietary governments, or between two provinces of America, or in the Isle of Man, it was cognisable by the king's courts in England only. The case of the Isle of Man, which was demanded by the Earl of Derby, was in the reign of Queen Elisabeth. The claim of the representatives of the duke of Montague, to the Island of St Vincents, was determined in 1764.

Mr Du Ponceau observes, that the famous case between William Penn and Lord Baltimore, was determined according to the law of England, which in all national matters, he says, never ceased to be the rule of right and wrong. We suppose he refers to the case, as reported by Vesey the elder, which was a bill in chancery, brought by Mr Penn against Lord Baltimore, to compel specific performance of an agreement, relative to difference between them respecting their boundaries. Lord Baltimore was a sort of sovereign prince over the province of Maryland; and Penn was the proprietary of Pennsylvania. Lord Hardwicke entered into an elaborate discussion respecting the jurisdiction, both of the court of privy council and chancery, in relation to questions arising upon subject matters abroad, the result of which was, that the court of privy council could not decree *in personam* in England, unless in certain criminal cases, and the court of chancery could not decree *in rem* out of the kingdom. But notwithstanding the degree of locality attached to the subject of the dispute in that case, the lord chancellor considered it as a matter of contract between the parties, to be executed by their personal acts, in which it was proper for the court to interfere.

In cases where the king himself was a party on one side, and where the colonies were concerned on the other, and which, therefore, could not with any propriety be brought before the king in council, the king's bench exercised original jurisdiction. An instance of this occurred in the famous proceedings of *quo warranto*, on which the charter of Massachusetts was adjudged to be forfeited, by a judgment of the court of king's bench. The general seizure of the

charters at this period was so arbitrary an act, that public opinion revolted at the mode in which it was exercised. Nevertheless, the king's bench was the supreme court of common law in the kingdom; and besides its general superintending and visitatorial authority over civil or lay corporations, and its prerogative power to issue writs of *mandamus*, its authority was considered, so late as the days of Lord Mansfield, as extending to the extremities of the empire, in order to prevent a failure of justice. If any forum was demanded for determining disputes between the king and colonies, as certainly was expedient under a free system, this tribunal was probably as little obnoxious as any that was established. But the question, concerning the judicial power of the king's bench, stood on very much the same foundation, as the legislative power of parliament. They ranked very nearly as coordinate authorities. Situated as the colonies were, in relation to the English government, they could not be satisfied to regard the king's bench as a constitutional tribunal for this purpose, and its jurisdiction was perhaps about as little relished, as that of the present supreme court of the United States is, by those western states beyond the Allegany, which have no representatives on the bench. As it was, upon the whole, it only pointed to a defect in the system.

The king's bench was also considered the highest court of original criminal jurisdiction in the kingdom, next to the House of Lords, having full authority to hear and determine all capital and inferior offences of a public nature; and, being the *custos morum* of all the subjects of the realm, does not require a precedent in every case to authorise its interference. Several acts of parliament were passed, authorising persons accused of crimes committed in the colonies, to be sent to England for trial. The statute of 35 Hen. VIII was revived for that purpose. The 12 Geo. III contained several capital enactments to this effect, and a particular act was passed, empowering the government of Massachusetts Bay to send to England, or to other colonies for trial, persons indicted for murder in that province. This was complained of as a grievous violation of the principles of common law; on which it was held, that the inhabitants of the colonies could not be transported for trial, to any other part of the realm; that there could be no criminal jurisdiction exercised, except

in the province where the crime was committed, or the accused had his domicil, without infringing the right of jury trial from the vicinage, the act of Habeas Corpus, and the common rights of English colonists.

On these grounds it was held to be the general judicial constitution of the colonies, that there existed in them a *jurisdiction preeminently competent to the cognisance of all criminal cases*, exclusive of the appropriate jurisdiction of the admiralty.* How clear and just a conclusion this was, from the cardinal principles of the common law, as a system of criminal jurisprudence, must be apparent to every reflecting lawyer. For the fact itself, that such conclusion was adopted, we refer to the authority of Dr Franklin.

In regard to the jurisdiction of the admiralty, which was emphatically a jewel of the crown, and ranked among the *jura coronæ*, or rights of sovereignty, it was established in the colonies on its appropriate principles; with the further peculiarity, however, that some part of the proper jurisdiction of exchequer was engrafted upon it, by virtue of some of the laws of trade; from which originated a singular usage to dispense with the trial by jury, in cases of this description. This was matter of complaint among the recitals in the Declaration of Independence, but the union became a usage, and the practice remains incorporated with it since the Revolution. It has been doubted in England, whether the jurisdiction of the admiralty was not, in its nature, so perfectly definite, as not to be capable of extension by act of the legislature; but this was in regard to prize, which was held to be an inherent portion of its power. The admiralty is there considered a court of municipal jurisdiction; the jurisdiction of prize was vested in other courts, however, in Scotland; and an act of parliament was required to regulate the practice. Mr Du Ponceau has some remarks respecting the admiralty, as being a perfect and absolute quantity; in respect to which, we have only at present to advert to the existing combination of the not very kindred institutions of the admiralty and exchequer, at least in their original creation, under the magnificent title of the former. *Miratur novas frondes et non sua poma.* We understand it to be a

* Franklin's Works, vol. i. pp. 297, 300; and vol. v. pp. 355, 356, and notes.

fact, not merely on the authority of Mr Burke, that the establishment of the admiralty in this country, before the Revolution, was chiefly as a security for the English navigation laws.

But the greatest defect, in the judicial administration of the colonies, was the want, in most of them, of a court of equity. In the king's governments, as they were called, the governor, or governor and council, officiated after the fashion of chancellors. But many causes contributed to impair the confidence of the community in this arrangement, objectionable as it was, also, on the score of principle. In the charter governments, as of New England for example, there was no chancery at all; and excepting in the power to give relief in mortgages, bonds, and penalties, in all other subjects of equity jurisdiction, the crown and the public were equally without resource. This circumstance explains one fact, that has long been an anomaly in our civil jurisprudence, namely, the practice of petitioning the legislature for relief, and the usage which has long existed, of interfering to afford it in this summary manner. This power was early exercised, to an extent beyond what that of chancery had ever been carried, even, as it was said, of suspending public laws, by mere orders or resolves passed without much solemnity.

The consideration of all these inconveniences, arising from the imperfect system of judicial authority existing in the colonies before the Revolution, led to the suggestion of some expedient for its improvement; and there was one it seems, that had been in contemplation, and was matured by some of the ablest lawyers in the colonies; viz. *the establishment of a Supreme Court of appeal and equity*, not confined to any single colony, but itinerating through several circuits. The arrangement was as follows. Nova Scotia and New England were to compose one circuit; New York, New Jersey, Pennsylvania, and Maryland, a second; and Virginia, the Carolinas and Georgia, the third. It was recommended, that this circuit system should be composed of two persons, at least, for each district, learned in the law not only of the mother country, but of the several governments in such district; that it should have full powers of a court of chancery, as well as of law, on matters brought before it by writ of error, from the several Superior Courts of the district to

which it extended; that it should regulate all the courts of law in the exercise of their jurisdiction; have a general superintendence over inferior courts; and thus become an established tribunal of appellate jurisdiction, which should tend to introduce not only a uniformity among the courts of the different colonies themselves; but also to produce a conformity to the courts of the mother country, in the dispensation and construction of the law.* These details are gathered from the work of Governor Pownall on the Administration of the Colonies; and the influence of a fact of this kind, which we do not remember to have seen referred to, will be at once estimated by those, who recognise in it a type of the present judicial establishment of the Union.

That these opinions, which were undoubtedly not formed without much consideration, were not reduced to actual experiment, was probably owing to the interruption of the Revolution. Other questions had grown up and become confounded with this, which it was beyond the authority of the civilian to settle. This was gradually assuming a revolutionary shape with the rest, so that the course of reform was necessarily suspended, and the voice of the law was subdued in the busy hum of preparation, on the eve of the great conflict. In this unsettled state, in which the subject existed at that period, it cannot perhaps be contended that the colonial jurisprudence had attained the shape of a system to such a degree, as to sustain the character of a universal system. Crude, nevertheless, as it may have been, it is there that we must seek for the elements of the common law of the country.

From this view of the subject it would seem, that the defect in the system of the colonies was one, rather of judicature, than jurisprudence. There was a sufficient fulcrum, the want was a lever. The great desideratum undoubtedly was a general judiciary establishment, with powers properly developed, and well defined, whose province should be to administer those principles of common law, that were equally applicable to their condition under their various local diversities; and the absence of such a provision is only to be supplied, by reflection upon the principles, which actually existed towards the formation of such a general judicial constitution, and also considering the true scale on which the

* Pownall's Administration of the Colonies &c, pp. 113, 114.

actual institutions of that period were constructed. The colonies at this period had lost their confidence in those, from whom a new organisation would have been expected ; and we believe there was at this period a feeling, prevalent in the colonies, unfriendly to any change proceeding from the crown. *Nolumus leges mutari* seems to have been their motto, and at the same time we observe among the causes of complaint against the king, recited in the Declaration of Independence, that he had obstructed the administration of justice, by refusing to cooperate in the establishment of judiciary powers.

From this imperfect review of the state of things before the Revolution, it seems, however, to result, that the general elements of English jurisprudence, excepting its ecclesiastical portion, existed in the colonies actually, or potentially, to such an extent, as to maintain the positions, that were assumed by the patriotic lawyers of that period, and which have been adopted by the soundest constitutional lawyers since. The Congress of the United Colonies, before they proclaimed their independence, in 1774, declared them to be entitled to the common law of England. We know by tradition, that Blackstone was received with delight in the colonies, as the expositor of their law ; and that whole editions of the commentary were exhausted in America ; and the active, liberal, and enlightened spirit of the American jurists of that age deserved the noble eulogium, which it drew forth from the eloquence of Burke. We may grant that their attention was principally attracted, at that period, to those points of personal liberty and rights of private property, upon which most of the original causes of controversy turned ; but these were insisted upon only as constituent parts of the general system of common law, interwoven into the constitution of all the colonies ; and where, we may ask, could they have found more genuine and authentic expositions of the truest principles of natural and municipal law combined upon this subject, than in the provisions of the common law, as expressed in Magna Charta, the Petition of Right, the Bill of Rights, and the Habeas Corpus Act ? All the acts and declarations of the period, to which we refer, were founded on this idea of a constitutional code of common law for the colonies, existing like that of England, in those legislative resolutions of

rights, redigested by the colonial congresses, and judicial determinations, legal usages, and established precedents, in which the common law consisted. Upon these followed, of consequence, the adoption of all those rules and doctrines, respecting the rights of persons, and laws of property, the definitions of which could be found in America only in that system. The common law was the only general form, to which the elements before referred to had been reduced throughout the colonies; and excepting the provisional establishment of equity powers, in some shape or other, in some of the provinces, together with probate courts, there was no other combination into which those principles may properly be considered to have been condensed. Whatever residue of judicial power and authority there was, remained in a state of suspension, or in the language of the law itself, *in nubibus.*

We believe it has never been denied, that the Revolution rendered us, on the principles of the declaration of independence, if it did not find us already constituted, one people. This Revolution did not dissolve the bonds of society, nor reduce us to a state of nature. The revolutionists were too well read in Locke, and their minds too deeply imbued with the principles of law itself, apart from the authority of writers, to admit a conclusion so barbarous, as that of abandoning all the body they possessed of municipal jurisprudence. There is hardly any person, we apprehend, who has done more to settle this subject, by slow degrees, than the present Chief Justice Marshall. Resorting so little as he does to authority, relying so little on precedent, reposing so much on principle, and drawing so much from the resources of enlightened reason, and profound philosophy, together with the caution that distinguishes his character and the natural moderation of his temper, there is no authority more likely to be referred to hereafter than his own, and there are no propositions, that will probably be found to require less limitation, or better bear the test of revision.

In the case of Livingston against Jefferson, which is found in the first volume of Hall's Law Journal, new series, the Chief Justice makes the following observations; 'When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applica-

ble to their new situation; and I do not conceive, that the Revolution would in any degree have changed the relations of man to man, or the law which regulated these relations. In breaking our political connexion with the parent state, we did not break our connexion with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority.' To this we may add, that it was the deliberate opinion entertained and pronounced by Chief Justice Ellsworth, while he was on the supreme bench, that the common law of this country remains the same as it was before the Revolution. We may also adduce to this point the opinion of Mr Du Ponceau, that the general system of laws, by which these colonies were governed, has never been repealed, either expressly or by necessary implication, but has always continued to be in vigor, so far as applicable to our varying situation.

The first serious question, that was made on this subject, we believe was by Judge Chase, on the trial of Worrall, in 1798, when he declared it with great energy as his opinion, that the United States had no common law, although the states had. But the common law of one state was not the common law of another; nor was the common law of England the law of any of the states, except so far as they had adopted and modified it by their respective statutes and usages, from which had resulted an endless variety, that could not be reconciled. This opinion, as Mr Du Ponceau remarks, made considerable noise at that time, and produced a vague but strong impression, as Judge Chase was known to be a man of powerful mind and extensive learning, and more addicted by his temper to extend, than to abridge authority. For the sins of his temperament, certainly, rather than the surrender of his trust, this patriotic and independent jurist was summoned to answer before the highest tribunal of his country, on several charges of impeachment; and since his universal acquittal from them, upon a judgment of the Senate, sanctioned by the subsequent voice of the nation, he has been gathered, without a spot on his integrity, to the rest of that race of our political fathers, who have gone to their reward through much tribulation. This opinion, although it did not compose one of the ingredients of his accusation,

gave rise to one of those unfortunate measures of legislation, the Sedition Act, which was passed soon after.

This opinion of Judge Chase, from which the Sedition Act resulted as a corollary, was employed by Professor Tucker of William and Mary's College, in Virginia, to combat that of Chief Justice Ellsworth in an essay, in which he exhausted all the diversities, anomalies, and antinomies, that could be brought into any relation to the subject; and this product of a political enthusiasm, he intended to embody as a permanent appendix to the commentary of Blackstone. The opinion of Judge Chase seems to have been reverenced and regarded as a sort of perpetual edict. It served as a text for the instruction of the General Assembly of Virginia in 1800. The Virginia Assembly did not pause at that time, to expose at large what they considered the monstrous pretensions, resulting from the adoption of the principle stated; to wit, that the common law of England was in force under the government of the United States. But besides the evils attending the exercise of such an unlimited criminal jurisdiction, as it opened, it was declared to arrest, or supersede state jurisdictions, and to innovate upon state laws; to assume a range of jurisdiction for the federal courts, which defied definition or limitation; and again, that it had a tendency to involve the existing institutions of federal and state courts in such an inextricable maze of confusion, that it would be impossible to separate their judiciary rights with precision, or avoid the constant and mischievous consequences of a conflict of rival jurisdictions. They, therefore, protested against the passing of any law by Congress, which was founded upon, or recognised this principle, except such parts of the common law, as might have a sanction from the constitution, so far as they were necessarily comprehended in the technical phrases, which express the powers delegated to the government; and also excepting such other parts, as may be adopted by Congress, as necessary and proper for carrying into execution the powers expressly delegated.

The opinion delivered by Judge Chase industriously confines the operation of the common law, as a civil rule, to cases between citizens in states, where the suits are instituted, whether in the federal or state courts indifferently; while

the Virginia resolutions, notwithstanding the broad language of the preamble, more considerately allow it the whole scope of the constitution. That this imagined common law of the Union can be in any manner the same, as the common law of England, Judge Chase positively denies; and what was the source of the common law acknowledged by the General Assembly of Virginia, is, by their instructions, in no wise indicated. The constitution does not clear up this point by any particular definition. It is a very just remark of Mr Justice Story, that the constitution of the United States *presupposes* the existence of the common law.

It then becomes a very interesting topic of examination, to ascertain what this common law is, which is thus, in his language, presupposed by the constitution. This point of inquiry, namely, wherein consists this anteconstitutional common law of this country is one, which Mr Du Ponceau undertakes professionally to answer. In the first place, he says, 'I consider *the common law of England* as the *jus commune* of the United States.' And, secondly, 'I think I can lay it down as a correct principle, that the common law of England, *as it was at the time of the Declaration of Independence*, still continues to be the national law of this country, so far as it is applicable to our present state, and subject to the modifications it has received here in the course of near half a century.' That is, subsequently to the Revolution. This proposition of Mr Du Ponceau is not, we acknowledge, without some embarrassment to our minds, in respect to the point of time, at which he fixes the period of this identification of the common law of this country, with the common law of England; for if we apprehend the statement aright, it is, that the common law of England was the common law of this country, at the epoch of the Revolution. We are not quite sure, however, that we do perfectly apprehend Mr Du Ponceau on this point; nor whether there is not a little indistinctness of vision in our own organ, rather than his. We do not imagine, that he means to arrive at such a result by any empirical process; and he, therefore, is not to be understood as attributing any inherent virtue and efficacy to the law of England, as being rendered thereby, at that period, the law of the colonies. Conquered and ceded countries, upon the principle so correctly considered by himself, retain their

laws and preserve their original customs; and much more a country like ours, which had conquered its independence, and achieved its own sovereignty, as a nation. Even the phrase of our *emancipation* was one, which Chatham could not endure; 'for when,' said he, 'were we ever slaves?' The principle of the *lex loci* is observed and respected, in regard to all extra-territorial authority; and the necessity of some medium to connect the existing system, with the antecedent state of jurisprudence, is too obvious to escape so penetrating and philosophical an observer as Mr Du Ponceau. It is proper, therefore, to look further into his dissertation, and compare the sentiments, which he expresses on this subject, with the sound principles upon which he undoubtedly determines to erect his system, and rest his opinion.

Mr Du Ponceau accordingly observes, that 'the common law may be viewed under different aspects; hence the variety of opinions that have been and still are entertained respecting it. Here is an ancient and a modern, an English and an American common law, making in some respects a whole, in some others distinct codes.' In his preface he expresses an opinion, that the English and American common law have been in some manner improperly confounded. We are aware with him, that the common law of England has its various periods, which may be distributed, like the Roman, into *jus antiquum*, *jus novum*, and *jus novissimum*. That which he selects, as the true meridian of the English law, and on which he lavishes his encomiums as the season of the greatest excellence in its history, is the space commencing with the middle of the seventeenth century, and ending at the time of the American Revolution.

'The true era of the common law is the period, which followed the great Revolution of 1648, to the time of our own emancipation. It was then that it assumed that bold and majestic shape, those commanding features, which have made it the pride of the nations who possess it, and the envy of those who do not. During that period, the rights of man have been acknowledged and defined, and limits have been set to the sovereign authority. The prerogatives of the crown (I am speaking here of England) have been ascertained, and restricted within proper bounds; the legislative, executive, and judicial authorities, have taken their re-

spective stations, and know the extent of their several powers; judges have been rendered independent, and juries have been freed from ignoble shackles. The writ of *habeas corpus* has been made effectual, a fair and unexceptionable mode of trial has been provided for cases of high treason. The press has been freed from the unhallowed touch of state licensers. Religious toleration has been established. The hand of arbitrary power has been paralysed; and man has been taught to walk erect, and to feel the dignity of his nature; civil jurisprudence has also been considerably improved, and is in a progressive state of further amendment.' pp. 111, 112.

As Mr Du Ponceau is speaking expressly, in this passage, of England, we do not know in what degree he intends his remarks to apply to the state of the colonies. How the common law, as the common law of England, could have any operation in the colonies during that period, we have no definite idea. The true time, at which the colonies received the common law, was that of their settlement, which was previous to the commencement of the auspicious era, descanted upon with so much animation by Mr Du Ponceau. There is no subsequent point, which we can fix without anachronism, for any general transfusion of its principles; and from that time forth, its improvement arose from its gradual adaptation of those principles to the condition of the colonies, and the adoption of those meliorations of it, which took place during this long interval in England. The power of legislation, upon subjects of common law, was deemed to have ceased in Great Britain, concerning the colonies, in so far, that legislative alterations of its principles were only received in their courts at their election. But judicial determinations, in regard to those principles, by the English tribunals, it is certainly true, carried some air of authority until the Revolution; and the legislatures of some of our states have in reality acted upon no false principle, in suspending the citing of such cases as authorities since the Revolution, although there would be no great harm, perhaps, in permitting them to be read. That there was some affinity, therefore, between the two systems, during this long middle age of the common law, seems quite apparent.

Mr Du Ponceau again observes, 'That the common law was the common jurisprudence of England, and her English

colonies, under such modifications as their peculiar situation required. In all cases for which the local law had not provided, or to which it was not applicable, this national law, (as he terms it,) was the rule of decision.' In this general relation to the mother country and the colonies, he compares it to the civil law, which is called the common law, *jus commune* of Europe; which each separate government has modified, as it thought proper, to suit its own local circumstances; or if it has introduced into its territories new edicts, new laws, and new codes, still the civil law governs in all their common concerns. As the civil law is now in Europe, so the common law in America 'was not indeed paramount to the local customs and statutes, but it was the fruitful source from which principles were drawn to aid in the solution of all the doubts and difficulties, which arose from them, and the rule by which unforeseen cases were decided. It was a general system of jurisprudence, hovering over the local legislation, and filling up the interstices. It was ready to pour in at every opening it could find. Like the sun under a cloud, it was overshadowed, not extinguished, by the local laws. It lost nothing of its force, its power, or its vigor. It burst in at the moment of the adoption of the constitution of the United States, and filled up every space, which the state laws ceased to occupy.'

If we comprehend Mr Du Ponceau's idea in this glowing passage, it is, that the common law of which he speaks, is neither the English common law, nor the American common law, exclusively, according to the distinction previously suggested by him, but the common law of England and the colonies together, and so continued until the time of the Revolution; and that the whole body of it was adopted with the constitution, to supply all these spaces, which were opened or created for its application, by the operations of the new form of government. So far as Mr Du Ponceau may be understood to speak of the common law of England, as a great reservoir for supplying the jurisprudence of the colonies, we apprehend him to be correct; and we are not prepared at present to deny, that there might have been a certain portion, or residuum of this power, in his own moderate sense of the term, which, of course, remained suspended during our dependant colonial condition; and which instant-

ly, perhaps, became applicable in the due exercise of the judicial faculty of national sovereignty. Indeed we believe, that in practice, the principles of the common law were immediately, and have always been applied to the civil relations, subsisting between the government, and its officers, and citizens. Some rule was certainly necessary, and we know of none, that could have been so properly adopted. Whether the authority, under which this rule went into operation, was derived entirely from its adoption by the constitution, or whether the principle possessed some previous potential vigor, and elastic force, is a dilemma in which we understand Mr Du Ponceau rather to favor the latter alternative.

While we have no difficulty in conceiving, how a common law could exist in this country upon some principle before the constitution, we have some, however, in apprehending how there could be a common jurisprudence between England and her colonies, during the last century, except under very considerable limitation. That the common law of the colonies, indeed, could not be the same as the exact common law of England, is quite obvious. There could not be in all respects a common law to both countries. There could be no common rule to such various relations, as were divided by the ocean, any more than the same doctrine of real estate can be applied to wild land and cultivated; and that portion of the common law, which Mr Du Ponceau describes, as having been brought into being with the constitution, could assuredly have had no actual existence in this country before the Revolution.

It was very justly remarked by Lord Mansfield, that the law of England would be a very singular science, if it depended on precedents only. Precedents serve to illustrate principles, and to give them a fixed authority. The law, he observes, does not consist in particular cases, but in general principles, that run through the cases and govern the decisions of them. It is undoubtedly true, that the genius of the common law is essentially analytical. Its courts decide nothing but cases; all the rest is mere *obiter dictum;* and it is evident that Lord Eldon's mind, with a strong native cast towards equity, received its original schooling in the common law. It is charged upon the common law as a solecism, by

Holcroft, in his novel of Hugh Trevor, that the rule is always the same, while the cases are different; but such a remark would never be uttered by a man of philosophical reflection. Dr Cooper speaks with more propriety in saying, that 'principles may, with due care, be so clearly expressed, that they will admit of little doubt; while the *innumerable variety of cases, that will come under them*, no effort of human wisdom can reduce to any system *a priori*; they will arise from circumstances, with which we are totally unacquainted; from modes of social intercourse, which will receive their origin, when we are dead.' We are no apologists, more than Dr Cooper himself, for what may justly be deemed bench legislation; but we are warm advocates for that species of legislation, which is wrought by the spirit of the age.

Time is unquestionably the great legislator; and we cease to inquire into the annals of past ages, to find the wisdom that is necessary to guide our own. Changes, therefore, are insensibly wrought in the circumstances of a country, to which it is necessary, that not only the laws themselves, but also the spirit of the laws, should be accommodated. This alteration is not produced; it already exists before it is announced; and excepting those cases, which are proper for the interposition of the legislature, society has yet to invent some more suitable organ for pronouncing it, than its own judicial authority. As for many of those cases, that pass under the odious name of judicial legislation, we conceive they are frequently little else, than a mere sound discrimination and application of the most apt and enlightened principles. We thought there was hardly any reproach, to which the common law of England was less liable, than one of this sort. The complaint has rather been, that it was not sufficiently ductile. It is a maxim of that law, for example, that statutes altering the common law should be construed strictly, and also that no statute ever becomes abrogated, although really reduced to a dead letter, by disuse. And whether this rigid system of precedents, even accompanied with all the original and inherent redeeming excellencies of the common law, but governed at the same time by the impracticable spirit prevailing upon the English bench, ought to constitute the precise rule of municipal jurisprudence for the United States, to be measured at the exact moment of

their independence, without regard to the very considerable changes, that it had experienced and undergone in its actual application to the state of society on this side of the ocean, and without making allowance, moreover, for the more mutable and practical aptitude, which its principles had acquired in the character of a system for the colonies, during the long period of their dependence upon the crown of Great Britain, would be that proposition upon which we should linger a long time, before we gave it our absolute assent.

But the American common law, we apprehend, is in quite another tone and spirit. On this topic we may avail ourselves of the remarks made by Mr Du Ponceau, upon the essential improvements, which civil jurisprudence has undergone in the United States; and this is in those respects, in which he considers the common law to be originally inferior to the civil. He considers it to be still in a progressive state of improvement, and to be becoming more and more 'dignified with American features.' Our landed estates, for example, have become allodial; the traits of the feudal system are nearly effaced, excepting a few forms and phrases, among which, that of *fee simple* still survives. The principles of conveyancing are simplified, and registries established to supersede the ancient form of livery of seizin. Entails, where not abolished, are very easily destroyed. Survivership in joint tenancy is almost extinct. The laws of descent are assimilated to the rules of succession, established by the Roman law; and the privilege of primogeniture is abolished. 'If children, then heirs.' The intricate peculiarities of English practice in general are less observed; legal proceedings rendered less expensive, and legal rights more easily understood by those, who cannot pretend to be subtle lawyers.

Now the most of these changes were actually effected, and the principles of them all were in operation, and the whole impulse, in fact, communicated before the Revolution. From all this it is moreover apparent, as if of much greater consequence, that the American common law had acquired a spirit of change; and that this spirit had moved over the face of the deep, which was no longer a dead and stagnant surface, but was excited with all the vigor of a new creation. Whatever inflexibility may be arrogated, or attributed to the English system, the character of our own is not so

harsh and rugged, as many have deemed it; and if such be the true quality of the common law of England in any degree equivalent to the supposition, we regard it as a still further evidence of the actual departure, which the American common law had acquired from it, anterior to the epoch prescribed by Mr Du Ponceau.

That the common law did exist in this country, before the Revolution, is a mere matter of fact, totally independent of any argument concerning its excellence, or any question touching its character as a system. There must be some law in every country, and this was the law of ours; at least until some more satisfactory conclusion can be established. 'But why,' says Mr Du Ponceau, and we take pleasure in borrowing the following beautiful, and somewhat Ciceronian passage, 'why need I go into such a wide argument to prove, what I consider a self evident principle? We live in the midst of the common law; we inhale it at every breath, imbibe it at every pore; we meet it when we wake, and when we lay down to sleep; it is interwoven with the very idiom that we speak, and we cannot learn another system of laws, without learning at the same time another language. We cannot think of right or wrong, but through the medium of the ideas, that we have derived from the common law.' It is the very *ens rationis*, and, as Mr Du Ponceau observes in another place, is a part of every civil and political institution. In this sense it becomes quite obvious, that the United States must have a general law, not so much arising out of their constitution, as resulting from their condition, suiting itself to their national circumstances, fitting itself to their federal relations, and incorporating itself with their municipal concerns and uses.

A civil community cannot be conceived to exist without a body of jurisprudence; and it is no doubt perfectly correct to say, as has been suggested by one of our most valuable, though least obtrusive jurists, that our present social contract must be supposed to have been formed upon the supposition of certain fundamental principles of social order, derived from the common law, or as he terms it, 'adopted under *our* English common law,' whether expressly referred to by it or not. No language can be more correct, in our judgment, than to say, that this was the element of the constitution.

Nor does this phraseology exclude the use of the civil law as a principle of interpretation, whenever it may be important to the same instrument. The security of the rights and repose of private society against general search warrants, of the conscious independence of personal liberty against arbitrary seizure or extravagant stipulation, the indemnity of individual property against acts of involuntary benevolence, or in other words, the resistance of taxation without representation; the independence of thought, together with its signs, of speaking, writing, and publishing, as well as the liberty of volition and action, within the bounds of law; these were the topics that were perpetually harped upon out of the common law, and served to fan the flame of freedom on both sides of the Atlantic.

On the same platform of our original common law, we are able to keep pace with the progress of the most enlightened principles of national and public law, and avail ourselves of the advances of general jurisprudence in the improvement of our civil code, or the explication of our political system. In that manner, without doubt, the United States will eventually come to have a common law, 'not that of England, nor of Rome, nor of France, but the common law of the United States.' In that manner, together with that body of natural reason and law, which is requisite for the municipal order of civil society; and those usages, which we have derived from England, and those customs, which were established in the colonies; and those legal principles, that we have already borrowed from other sources, with those that we may hereafter extract from foreign codes, or the future combinations of our concerns and interests, we shall probably acquire a system of common law, suitable to expound and give effect to the constitution, and open a sufficient field for the operation of all the benevolent and equitable principles.

We have expressed our assent to the doctrine of Mr Du Ponceau, respecting the existence of a common law for this country. We acknowledge its necessity to the exposition of the constitution. We admit it was an element floating, if he pleases, in the atmosphere. We regard it still as a vast reservoir of valuable jurisprudence; but we are not satisfied with the correctness of his expression, in calling it the common law of England, and fixing its authority at the epoch of

the Declaration of Independence. It seems to us to be beginning with the old phrases of the civil law *Regiam Majestatem.* We are far, as we hope we have already said, from charging upon Mr Du Ponceau the heretical idea of any inherent efficacy, in the law of England at that instant, as binding us *proprio vigore;* and yet something of that kind seems necessarily to be implied, without some kind of *mordant,* or *medius terminus,* to ground the color, or connect the consequence with some immediate cause. And it is difficult to discover, what basis of authority the common law of England could rest upon in this country, at the period of the Revolution, similar in any manner to the authority which it enjoyed in England; or equivalent even to the predominance, which the civil law has obtained upon the continent of Europe. We have even yet to learn how the common law of England, in the capacity of common law of England, could prevail in the colonies during the century after their settlement.

We will add our concession to the criminal law of England, of all the unrivalled excellence that belongs to it as a rule of jurisdiction, and also as a species of jurisprudence connected with all there is valuable in English liberty. But, agreeing with Mr Du Ponceau, respecting the existence of an American common law, independent of that of England, we are induced to give it an origin somewhat beyond the breaking out of the Revolution; and after that period, until the adoption of the national constitution, at which time he represents the whole tide of common law pouring in upon us, there was a considerable interval. At that latter period certainly a foreign code, like the law of England, could have owed its obligation only to our adoption; but a limitation of its authority, like that, would not probably be insisted upon by Mr Du Ponceau. The common law, which constitutes the desideratum in his mind, requires some grounds, for which we must search into the state of things long before our independence; and we may discover it by analysing those general principles and usages, which are to be found in 'that generally received and long established law, which forms the present *substratum* of the laws of every state in the Union.' This is the doctrine of Chief Justice Marshall, and we deem it incapable of any addition or subtraction for its improvement.

We would not undertake to be perfectly confident, however, on any point, on which we might have the misfortune to appear to differ from Mr Du Ponceau, and least of all would we engage in any mere difference about words. Perhaps he is to be understood by his favorite phrase, *common law of England*, as making use of that sort of metaphor in describing the common law of this country, before the Revolution, which our forefathers were so fond of employing, in all the models they made of their social and civil institutions. England, before the Revolution, was always called home; and in this way, the common law of the colonies may be deemed to have acquired, and preserved the name of the common law of England. In the same manner the expression may be understood to have been used by Mr Du Ponceau, who in no part of his book is to be considered as having adopted it, without an implied reference to the changes, which the system had undergone in this country. We have no right to understand him in any sense, which a sound view of the subject will not warrant; nor without all those limitations, which the most careful reflection would suggest. Nor are we aware, that Mr Du Ponceau intended anything by the language alluded to, beyond what the most profound analysis of the principles, on which our institutions rest, would authorise. His known precision of language will not allow us to suppose, that he uses any terms without a perfectly appropriate signification; but we are after all inclined to query, whether, on the present occasion, he has sufficiently guarded himself against misapprehension.

ART. VI.—*A Review of the Efforts and Progress of Nations, during the last Twentyfive Years. By J. C. L. De Sismondi.* Translated from the French by PETER S. DU PONCEAU. 8vo. pp. 36. Philadelphia, 1825.

THIS pamphlet was originally written, as an Essay, in the *Revue Encyclopédique.** It professes to be a survey, taken

* The Revue Encyclopédique is the most valuable foreign journal, which an American can consult, for variety of information and liberality of tone.